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VIA EMAIL AND U.S. MAIL

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Dena Reed, Interim Chair
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Chief Teresa Chambers
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Re: Unlawful Arrest and Detention of Reason.tv Producer

Dear Attorney General Nathan, Interim Chair Reed, and Chief Chambers:

I am writing on behalf of my clients, James Epstein, a producer for Reason.tv, and the Reason Foundation, a 501 (c)(3) charitable research and educational foundation that, in addition to Reason.tv, publishes Reason Magazine. On June 22, 2011, Mr. Epstein was unlawfully handcuffed, arrested, and jailed while attempting to report on a meeting of the D.C. Taxicab Commission at the U.S. Park Police Headquarters in Anacostia Park in the District of Columbia.

The arrest was triggered by Mr. Epstein's journalistic act of videotaping the illegal arrest of another reporter, Pete Tucker of TheFightBack.org, who was handcuffed, physically removed from the meeting, and similarly detained by U.S. Park Police. Both reporters were jailed for several hours and their photographic equipment seized by the police. They were not released until after a lawyer for Reason appeared at Park Police Headquarters to ensure that Mr. Epstein's rights were not further violated.

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Mr. Epstein and Mr. Tucker both were placed under arrest for “disorderly conduct” and “unlawful entry – remaining,” neither of which has any possible merit as was apparent at the time.¹ Mr. Epstein’s video, which could be posted only after his equipment finally was retrieved from police custody, showed clearly that there was no disorderly conduct of any kind. Rather, his video documents something that should be unknown in a free society – the sad spectacle of a reporter being arrested by police and led away in handcuffs from a public meeting he was attempting to cover. That video is available at (<http://reason.tv/video/show/taxi-commission-arrest>). Mr. Epstein, in turn, was arrested and jailed for doing nothing more than documenting Mr. Tucker’s unlawful arrest.

We have been advised that both the U.S. Attorney’s Office and the District of Columbia Office of the Attorney General are declining to press charges in this matter. This obviously is the right thing to do, and we acknowledge and appreciate the prompt resolution of potential criminal charges. Nevertheless, it is important to impress upon you the serious nature of the violations of fundamental rights that occurred. And while it is fortunate that the federal and district governments did not make matters worse by pursuing a futile and baseless prosecution, deciding not to inflict further harm does not by itself cure the deprivations that took place.

The arrest and detention of journalists for reporting on and documenting the meeting of a public body plainly violates the First Amendment to the United States Constitution as well as the Due Process Clauses of the Fifth and Fourteenth Amendments. The attempt to impede coverage of Taxicab Commission proceedings also violates the D.C. Open Meetings Statute, D.C. Code § 1-207.42. Additionally, the seizure and detention of reporters’ photographic equipment violates the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa.

At this point, it obviously is impossible to change what happened. However, it is within your power to prevent future violations of this type and to fairly compensate Mr. Epstein and Reason for the unfortunate events of June 22.

Open Meetings and Unlawful Arrest

The public policy of the District of Columbia is that “all persons are entitled to full and complete information regarding the affairs of government and the actions of those who represent them.” D.C. Code § 2-571. Under the Open Meetings Act, as amended in 2010, meetings of public bodies must be open to the public. This applies to every D.C. government council, board,

¹ Under D.C. Criminal Code § 22-1321, to prove disorderly conduct the government must show that the defendant acted with a specific intent to provoke a “breach of the peace” or acted “under such circumstances that such a breach of the peace may be occasioned thereby.” A reporter’s actions in recording a public event cannot possibly fall under this standard. With respect to the unlawful entry allegation, Section 22-3302(b) creates a misdemeanor for entering or remaining in a public building “against the will of the lawful occupant.” But this applies only when a person enters or remains in a public building “without lawful authority.” It is difficult to imagine a more inapt application of the law than when a reporter enters a public building to cover the meeting of a governmental body. See *Wheelock v. United States*, 552 A.2d 503, 505 (D.C. 1988) (“an individual’s otherwise lawful presence is not conditioned upon the mere whim of a public official”).

or commission, including the Taxicab Commission. § 2-573(3). A meeting falls under this requirement if either the public or news media is allowed to be physically present, or the meeting is televised. § 2-574(a). Before access to a public meeting may be closed in whole or in part, the public body must meet in public session and a majority of its members must vote in favor of the closure. § 2-574(c). Even then, the closure can be approved only for certain enumerated reasons, none of which apply in this case. § 2-574(b)(1)-(14).

While the D.C. Open Meetings Act does not specifically mention video recording of meetings and has not yet been authoritatively applied in a judicial proceeding, it must be “construed broadly to maximize public access to meetings,” and “exceptions shall be construed narrowly.” § 2-572. The Act clearly assumes a right to make video recordings, since it defines a public meeting, in part, by whether it is televised. § 2-574(a). In any event, courts in other states have interpreted similar open meeting laws to permit video recordings even where the law at issue does not address the issue specifically. For example, the Florida Court of Appeals found that “although the statute does not explicitly provide for the video recording of public meetings, the refusal to allow such recording certainly violates the ‘statute’s spirit, intent, and purpose.’” *Pinellas County Sch. Bd. v. Suncam, Inc.*, 829 So. 2d 989, 990-991 (Fla. App. 2002).

Like the D.C. Open Meetings Act, the Florida Sunshine Law provides that it be “broadly construed to effect its remedial and protective purpose.” *Id.* at 990. Accordingly, the court in *Suncam* found that a school board did not have “unfettered authority to deny videotaping of its otherwise public meeting.” *Id.* The same reasoning applies to meetings of the D.C. Taxicab Commission.

Unfortunately, it appears that the Commission flouted the Open Meetings Act even before the June 22 meeting. According to news reports, the Taxicab Commission last March threatened to ban a photojournalist from a local television station from its meeting. Although it relented on that occasion, it subsequently posted a sign at its offices announcing a new policy:

Without the express prior approval of the District of Columbia Taxicab Commission there shall be NO television cameras, No video taping and No audio taping of DC Taxicab Commission proceedings.

The purported new policy also stated that “[a]ny prior or future approval of the use of cameras, video taping or audio tapings [sic] does not create precedence [sic] for such access.”

This obviously is at odds with the District’s Open Meetings Act, yet this unauthorized policy was the basis for Mr. Epstein’s unlawful arrest on June 22. Although the arrest was supposedly for “unlawful entry” (an oxymoron at an open meeting of a public body) and for “disorderly conduct,” Mr. Epstein did nothing more than photograph the unlawful arrest of another journalist. A staff member of the Commission warned Mr. Epstein that he did not have “permission” to make a video of the incident. At that point, witnesses overheard a Park Police officer tell the staff person that she would confiscate Mr. Epstein’s camera. He was then arrested, handcuffed, and taken to a jail cell.

First Amendment and Due Process Violation

Mr. Epstein's arrest presents a far more serious issue than just the Commission's failure to adhere to the Open Meetings Act. Arresting a journalist in such circumstances clearly violates the First Amendment right to freedom of the press as well as the right to Due Process. A nearly identical situation arose in *Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999), where a reporter was unlawfully arrested for videotaping a meeting of the Pembroke Massachusetts Historic District Commission. Iacobucci declined to obey orders of the board chairman to stop taping, and ultimately was arrested for disorderly conduct and disrupting a public assembly. He spent about four hours in custody before the authorities released him, and the criminal charges eventually were dropped.

Iacobucci filed suit under the Civil Rights Act, 42 U.S.C. § 1983, which provides a private right of action against officials who, acting under color of state law, deprive individuals of federally-assured rights.² The district court awarded Iacobucci \$75,000 in compensatory damages for the unlawful arrest. On appeal, the United States Court of Appeals for the First Circuit rejected the police officer's qualified immunity defense, noting that a reasonable officer would have taken into account the state Open Meeting Law and would have understood that the "lawful exercise of a First Amendment right" does not constitute disorderly conduct. *Id.* at 24. The court explained:

Boulter's repeated demands that Iacobucci cease recording do not change the disorderly conduct calculus. A police officer is not a law unto himself; he cannot give an order that has no colorable legal basis and then arrest a person who defies it.

Thus, "an objectively reasonable officer would not have thought that Iacobucci was subject to arrest for disorderly conduct." *Id.* at 24-25. *See also Wheelock*, 552 A.2d at 506, n.2 ("the government must demonstrate that the limitation was reasonable and not designed to suppress expression").

Precisely the same reasoning applies to this case. Mr. Epstein was arrested for practicing his constitutionally-protected profession as a journalist by taking video images at a public meeting covered by the District's Open Meetings Act. Pretextual claims that he "unlawfully entered" the public meeting of a government body or that his reporting constituted "disorderly conduct" are utterly insupportable. *See id.* at 509.

Violation of the Privacy Protection Act of 1980

The seizure of Mr. Epstein's camera and of his journalistic work product incident to his arrest and detention also violated the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa. Under

² For federal officials, a similar cause of action is authorized under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

the Act, it is illegal for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search or seize any work product or documentary materials “possessed by any person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication.” Government officials seeking such materials must proceed using a subpoena, except under very narrow circumstances that do not apply here. The law authorizes civil actions for damages against government officials who violate the Act, and provides for the recovery of actual damages, but not less than liquidated damages of \$1,000. 42 U.S.C. § 2000aa-6(a), (f). Also, just as with suits under 42 U.S.C. § 1983, the prevailing party in a Privacy Protection Act claim is entitled to recover reasonable attorneys’ fees and other litigation costs. *Id.*

A district court awarded statutory damages and attorney’s fees for a violation of the Privacy Protection Act in a case not unlike this one. In *Minneapolis Star and Tribune Co. v. United States*, 713 F. Supp. 1308 (D. Minn. 1989), the court awarded \$3,000 in damages and over \$80,000 in attorney’s fees (plus nearly \$32,000 in expenses) after journalists were threatened with arrest if they declined to give to the FBI their film and videotape of a narcotics arrest. As in this case, the government declined to press charges, and the photographic equipment was returned undamaged after being held for about three hours. *Id.* at 1310.

Here, Mr. Epstein’s camera was seized upon his arrest and was not returned until several hours later when he was released. The Park Police originally planned to retain the camera and the images it contained as “evidence” for the criminal charges, and would have done so had it not been for the intervention of counsel. However, even though the camera ultimately was returned, the seizure delayed online posting of news and images of Mr. Tucker’s unlawful arrest, which was a highly newsworthy event.

Proposed Resolution

It is in the interest of all concerned that this matter be resolved promptly and without litigation. The District and federal governments took a significant step in the right direction by declining to prosecute the journalists involved. They may now help undo the damage caused by the Taxicab Commission’s violations of the Open Meetings Act and by the unlawful arrests on June 22. Mr. Epstein was subjected to illegal arrest and incarceration, and faced the prospect of nine months in jail and a \$1,250 fine if convicted on the disorderly conduct charge, and six months in jail and a \$1,000 fine if convicted on the unlawful entry charge. For its part, Reason was required to hire outside counsel when it was unclear when Mr. Epstein would be released and his equipment returned.

Any informal resolution of this matter must address each of these issues. The Taxicab Commission must adopt a policy that strictly adheres to the letter and spirit of the Open Meetings Act, including a statement making it clear that audio and video recordings of open meetings will not be impeded. Mr. Epstein should be compensated for suffering the indignity of an illegal arrest and detention. And Reason should be reimbursed for legal expenses caused by the illegal arrest. The sooner these issues can be resolved the better, but in no event should this matter drag on beyond the next meeting of the Taxicab Commission on July 13.

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Please contact me if you have any questions. I look forward to your response.

Sincerely,



Robert Corn-Revere

cc: Mayor Vincent C. Gray - eom@dc.gov

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